

Suppliers beware: Consumer Authority has broad powers to enforce consumer rights

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Introduction

Since 1 January 2007, a new regulatory authority called the Consumer Authority ('Consumentenautoriteit') has been in existence in the Netherlands. It was established pursuant to the Consumer Protection Enforcement Act (Wet handhaving consumentenbescherming, Whc), which implemented EC Regulation 2006/2004.¹ The Consumer Authority is responsible for providing information on consumer law to consumers and suppliers and responding to cross-border requests by other competent authorities. More importantly for suppliers, it also has an important enforcement function, having at its disposal both administrative and civil law remedies to enforce consumer laws implementing EU consumer legislation. This article briefly outlines the enforcement of consumer law in the Netherlands and then explains the Consumer Authority's duties and powers.

Background

Consumers are well protected under Dutch law. Even if the parties have agreed on a jurisdiction clause declaring a foreign court competent, consumers resident in the Netherlands are, in most cases, able to sue before the Dutch courts.² In addition, even if the parties have agreed that their contract will be governed by foreign law, mandatory Dutch consumer law (such as consumer legislation on general terms and conditions and the sale of goods³) prevails, in most cases, over the relevant provisions of the chosen foreign law.⁴ Furthermore, if a professional party seeks to enforce a contractual provision against a consumer resident in the Netherlands before a Dutch court, such court must, on its own initiative, rule that the consumer is not bound by the relevant provision if it is contrary to a statutory provision implementing the Directive on Unfair Contract Terms, even if the consumer did not appear at the relevant court hearing or failed to invoke the relevant statutory provision.⁵

While consumer protection in individual cases is strong, however, collective actions against unreasonably burdensome general terms and conditions are still a rarity. Prior to the arrival of the Consumer Authority, there was no supervisory authority specifically authorised to deal with such matters. Instead, consumer organisations occasionally requested the Court of Appeal of The Hague (Gerechtshof Den Haag) to rule that certain clauses in general terms and conditions were unreasonably burdensome and to order the supplier to stop using such clauses. The most recent case is HCC vs. Dell, in which the Court of Appeal of The Hague ruled, among other things, that the clause in Dell's general terms and conditions requiring consumers to pay the purchase price up-front was unreasonably burdensome because under mandatory Dutch law on the sale of consumer goods, provisions requiring the consumer to pay more than half of the purchase price up-front are deemed unreasonably burdensome.⁶

¹ Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws (2006/2004/EC) and Consumer Protection Enforcement Act (Wet handhaving consumentenbescherming) (Stb. 2006 591).

² Articles 15-17 Regulation on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters (2001/44/EC) and Articles 6 (d) and 8 (3) Dutch Code of Civil Procedure

³ Articles 6:246 and 7:6 Dutch Civil Code.

⁴ Article 5 Convention on the Law Applicable to Contractual Obligations 19 June 1980 (1980/934/EEC) and Articles 6:247 (4) and 7:46j Dutch Civil Code.

⁵ Court of Justice of the European Communities, *Océano* (NJ 2000 730, 27 June 2000), Court of Justice of the European Communities, *Cofidis* (NJ 2003 703, 21 November 2002) and Court of Justice of the European Communities, *Mostaza Claro/Centro Movil* (NJ 2007 201, 26 October 2006).

⁶ Articles 6:240-243, 7:26 (2) and 7:6 Dutch Civil Code and The Hague Court of Appeal, *HCC/Dell* (NJ 2004 483, 6 July 2004 and LJN AT1762, 22 March 2005).

Duties of the Consumer Authority

The Consumer Authority is responsible for the promotion of fair trade between businesses and consumers, based on the economic interests of consumers. Its main duties are:

- providing information to consumers and suppliers (via a helpdesk and a website www.consuwijzer.nl);
 - coordinating cross-border requests for mutual assistance by other competent authorities on the basis of Regulation 2006/2004;
 - monitoring compliance with laws implementing EC consumer law legislation; and
 - if necessary, taking action to enforce laws implementing EC consumer law legislation.
- Of the laws falling within the scope of the Consumer Authority's monitoring and enforcement powers, those of most relevance to suppliers are in the areas of:
- misleading advertisements (Articles 6:194a et seq. of the Dutch Civil Code);
 - unfair contract terms in consumer agreements (Article 6:231 et seq. of the Dutch Civil Code);
 - distance selling (Article 7:45a et seq. of the Dutch Civil Code); and
 - e-commerce (Article 3:15a et seq., Article 6:196c and Article 6:227a et seq. of the Dutch Civil Code).

Powers of the Consumer Authority

The Consumer Authority is authorised to take action against not only cross-border infringements (as Regulation 2006/2004 prescribes), but also purely national infringements. If the Consumer Authority had existed at the time, it would have been able to commence the same proceedings as HCC did in the HCC vs. Dell case referred to above.

However, the Consumer Authority's powers do not extend to every infringement that has been reported to it. Action is only possible where consumers' collective interests are affected.

Also, as explained in the legislative history of the Consumer Protection Enforcement Act, the Consumer Authority will, pursuant to the principle of subsidiarity, most likely only act in cases where the market is unable to solve the relevant problem itself.⁷

Enforcement by the Consumer Authority

If the Consumer Authority decides to take action against an infringement, it has powers of enforcement under both administrative and civil law.

The Consumer Authority is most likely to use its powers of enforcement under administrative law where the infringement arises under fairly clear-cut legislation. These powers include the imposition of a fine and/or the issuance of a cease and desist order, sanctioned with incremental penalties if the order is violated.

The Consumer Authority is most likely to use its powers of enforcement under civil law where the infringement arises under legislation containing open standards. In that event, the Consumer Authority is authorised to, among other things, commence proceedings before the Court of Appeal of The Hague. The court can issue a cease and desist order, sanctioned with incremental penalties if the order is violated, as well as publish its decision.

Conclusion

The Consumer Authority may enforce Dutch consumer law by imposing sanctions under administrative law (fines, cease and desist orders and publication) or commencing civil proceedings (cease and desist orders and publication) against infringements affecting consumers' collective interests. The possibilities for the collective enforcement of consumer law against suppliers have thus been greatly increased. Suppliers should therefore ensure that their general terms and conditions and trade practices are in conformity with Dutch consumer law if they want to avoid, as much as possible, enforcement measures by the Consumer Authority and negative publicity.

⁷ See the explanatory memorandum: Kamerstukken II 2005-2006, 30 411, nos. C, 3 and 6.